

FEDERAL MAGISTRATES COURT OF AUSTRALIA

CHEN v MINISTER FOR IMMIGRATION & ANOR

[2010] FMCA 950

MIGRATION – Review of decision by Migration Review Tribunal – whether Migration Review Tribunal’s decision affected by jurisdictional error – whether the Migration Review Tribunal was obliged to take evidence from 3 witnesses – whether the Migration Review Tribunal considered a piece of critical evidence – whether the Migration Review Tribunal properly considered the corroborative evidence before it – whether it was open to the Migration Review Tribunal on the evidence and material before it to conclude that the review applicant and visa applicant had not demonstrated that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship – whether the Migration Review Tribunal’s adverse credibility findings were open to it.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.361; 362; 363; 474; pt.8 div.2

Migration Regulations 1994 (Cth), reg.1.15A; 1.15A(3)

Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin (2005) 88 ALD 304

NALQ v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 121

Minister for Immigration and Multicultural and Indigenous Affairs v SZGLB

Minister for Immigration and Citizenship v SZNVW [2010] FCAFC 41

Minister for Immigration and Citizenship v SZIAI (2009) 111 ALD 15

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

Minister for Immigration and Multicultural and Indigenous Affairs v Katisat [2005] FCA 1908

Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003 [2005] FCAFC 73

WAFP v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 319

Minister for Immigration & Multicultural & Indigenous Affairs v Yusef (2001) 206 CLR 323

Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002 (2003) 73 ALD 1

Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407

Applicant:	XIAOPING CHEN
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 1141 of 2010
Judgment of:	Emmett FM
Hearing dates:	25 October 2010 and 3 November 2010
Date of Last Submission:	3 November 2010
Delivered at:	Sydney
Delivered on:	9 December 2010

REPRESENTATION

Counsel for the Applicant:	Mr B. Zipser
Counsel for the Respondent:	Mr T. Reilly
Solicitors for the Respondent:	Ms K. Whittemore, Australian Government Solicitor

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 1141 of 2010

XIAOPING CHEN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Migration Review Tribunal (“**the Tribunal**”) dated 30 March 2010 and handed down on 31 March 2010.
2. The review applicant, Ms Xiaoping Chen, is a citizen of the People’s Republic of China (“**China**”) and an Australian citizen since 1999 (“**the Review Applicant**”). The Review Applicant was married to Mr Jian Hua Sun (“**the Visa Applicant**”) on 18 January 2007 in China and was the sponsor in respect of the Applicant’s Subclass 309 Spouse visa application.

3. The broad issues in this case are whether the Tribunal constructively failed to exercise its jurisdiction in that it failed to take evidence from 3 witnesses and whether it failed to properly consider the totality of the evidence before it in affirming the decision under review. These issues are considered below in the context of considering whether the Tribunal's decision is affected by jurisdictional error.
4. Prior to considering the proceeding before this Court, these Reasons provide the relevant procedural background, a summary of the Visa Applicant's Partner (Provisional) Class UF Subclass 309 (Spouse Provisional) visa application claims and the decision of the delegate of the First Respondent ("**the Delegate**") and consideration of the Tribunal's review and decision.

Background

5. On 23 July 2007, the Review Applicant and the Visa Applicant's migration agent lodged an application for a Spouse Migration (Subclass 309) visa for the Visa Applicant. By letter dated 23 July 2007, the migration agent provided various forms and documents in support of the visa application.
6. The Visa Applicant was born in China on 25 February 1962. The Visa Applicant and the Review Applicant married on 18 January 2007 in China. The Visa Applicant was previously married, divorcing on 30 June 1999. The Visa Applicant is a citizen of China. The Visa Applicant has a daughter born in China on 18 March 1993 and a son born in China on 18 March 1993. The Visa Applicant's application also includes his 2 children. The children's applications are entirely dependent on the success of the Visa Applicant.
7. The Review Applicant, Ms Chen, was born in China on 21 November 1957 and became an Australian citizen on 2 June 1999. The Review Applicant currently resides in Australia. The Review Applicant was also previously married in 1982 and divorced on 11 July 2005. The Review Applicant also has two children, a son born on 10 April 1984 and another son born on 19 November 1998 from her previous marriage.

8. In the visa application, the Visa Applicant stated that he first met the Review Applicant in Fujian in China in November 2006 and commenced a relationship with her 10 days later. The Visa Applicant and the Review Applicant stated that they decided to marry in November 2006 and married in Fujian, China on 18 January 2007.
9. In a statement in support of the Visa Applicant's application, dated 26 June 2007, the Review Applicant stated that she met the Visa Applicant, her husband, through the introduction of a friend and her sister in law. The Review Applicant stated that in November 2006 she went to China to see the Visa Applicant. The Visa Applicant and the Review Applicant's sister-in-law met the Review Applicant at the airport in China and they had dinner together that night. The Review Applicant stated that the next day the Visa Applicant invited her for a walk and during her stay for the next two weeks "*put aside his own business and companied (sic) me everyday*". The Visa Applicant became her "*boy friend after two weeks*". The Review Applicant stated that when she returned to Australia she kept in contact by phone frequently and that, in 2007, the Visa Applicant proposed to her. The Review Applicant stated she sold the seafood shop business she had with her ex-husband on 31 December 2006. The Review Applicant stated that she then returned to China where she and the Visa Applicant were married in January 2007. The Review Applicant stated that she returned to Australia to take care of her youngest son who is still in primary school in Australia. Thereafter, the Review Applicant and the Visa Applicant have lived separately in two countries, although the Visa Applicant has visited the Review Applicant in Australia and sends her money from China "*to afford my daily expenses*".
10. In support of his visa application, the Visa Applicant provided a statement, dated 3 July 2007, in which he stated that he met the Review Applicant in November 2006 through the introduction of a friend of his and the Review Applicant's sister-in-law. He stated that at first he and the Review Applicant contacted each other by telephone. He stated that in November 2006 the Review Applicant came to China to spend her holiday and it was during that time they came to love each other. The Visa Applicant stated that at the end of 2006 he proposed to the Review Applicant not long after she returned to Australia. He stated that they married in China in a simple ceremony and that the Review Applicant

returned to Australia because of her job there and to take care of her children. He stated that they contact each other by telephone.

11. On 24 July 2007, the Visa Applicant and his twin children signed a Form 956 authorising their migration agent to be their authorised recipient.
12. The friend who introduced the Visa Applicant and the Review Applicant and the Review Applicant's sister-in-law both provided statutory declarations in support.
13. On 8 August 2007, the Australian Visa Office, Shanghai, wrote to the Visa Applicant acknowledging receipt of his visa application. The letter provided information to the Visa Applicant about the making of his visa application and invited him to send various documents. The letter also advised the Visa Applicant that any documents in languages other than English must be accompanied by an English translation.
14. On 5 September 2007, the Delegate in Shanghai emailed the Visa Applicant's migration agent to inform her that telephone interviews would be conducted with each of the Visa Applicant and the Review Applicant on 6 September 2007. The interview was rescheduled a couple of times and finally took place on 25 September 2007.
15. On 30 June 2008, the Delegate refused the Visa Applicant and his children the visas for which they had applied.
16. The Delegate accepted that the Review Applicant and the Visa Applicant were legally married on 18 January 2007 in China. However, the Delegate was not satisfied that they met the criteria set out in Reg. 1.15A of the *Migration Regulations 1994* (Cth) ("**the Regulations**") for the grant of the visa. The Delegate found the evidence of the social aspects of the relationship to be "*sparse*". The Delegate found that, although there was some evidence of telephone and written communications, the evidence was "*minimal*". The Delegate found that the communication between the Review Applicant and the Visa Applicant was not of the level that one would expect to see in a genuine relationship, especially considering that the Review Applicant and the Visa Applicant have been apart for the majority of their relationship. The Delegate found that there was limited evidence of the

couple's commitment to each other. The Delegate found that the Review Applicant and the Visa Applicant had not demonstrated "*a degree of commitment to each other consistent with their being in a genuine and continuing spouse relationship*".

The Tribunal's review and decision

17. On 25 July 2008, the Review Applicant lodged an application for review of the Delegate's decision with the Tribunal. The same migration agent was authorised to represent the Review Applicant before the Tribunal.
18. On 28 July 2008, the Tribunal wrote to the Review Applicant's migration agent acknowledging receipt of the review application. The letter invited the Review Applicant to provide any documents or written arguments she wished the Tribunal to consider.
19. By letter dated 17 September 2009, the Review Applicant's migration agent provided further documents in support of the review application. These included telephone bills of the Visa Applicant and telephone cards of the Review Applicant. The letter also included a letter from the Review Applicant, dated 17 September 2008, which essentially complained about the Delegate's decision.
20. On 23 January 2009, the Review Applicant's migration agent sent further documents to the Tribunal, including, further telephone bills of the Visa Applicant and used internet and telephone cards.
21. On 2 July 2009, the Tribunal wrote to the Review Applicant's migration agent inviting the Review Applicant to appear before the Tribunal. The letter enclosed a letter, dated 2 July 2009, addressed to the Review Applicant informing her that the Tribunal had considered the material before it but was unable to make a favourable decision on that material alone. The letter went on to invite the Review Applicant to come to a hearing on 23 July 2009 to give evidence and present arguments relating to the issues arising in her case. The letter also informed the Review Applicant that she may ask the Tribunal to obtain oral or written evidence from other persons or to obtain other written material and that such requests should be made by 9 July 2009.

22. On 2 July 2009, the Review Applicant's migration agent returned to the Tribunal a "*Response to Hearing Invitation*". Under the heading "*Witnesses*" in the Response to Hearing Invitation document it stated:

"You may request that the Tribunal take oral evidence from a person or persons. If you make such a request, the Tribunal will consider your request carefully but may decide that it is not necessary to obtain the evidence.

Unless you advise the Tribunal otherwise, we will assume that you will make arrangements for any witness to be available to give evidence."

23. The form then asked the Review Applicant whether she wished the Tribunal to take oral evidence from another person and the Review Applicant marked the box 'Yes'. The form then asked for the name of the potential witness and their contact details. The migration agent appears to have written beside those details "*We are not sure now, depends on if the person can get one day off*". There were no names or contact details provided in respect of any potential witness.
24. On 14 July 2009, the Review Applicant's migration agent sent to the Tribunal eleven statements in support of the review application, together with photographs, international telephone cards used by the Review Applicant to telephone the Visa Applicant and some correspondence. The statements included statements from the Review Applicant's brother, her sister-in-law, guests at their wedding, her new brother-in-law (the Visa Applicant's brother), the Review Applicant's son and the Review Applicant's mother.
25. At the hearing before the Tribunal on 23 July 2009, the Review Applicant attended with her migration agent, her son, her mother and her sister-in-law. The Tribunal had each of them sworn in at the commencement of the hearing, although ultimately decided not to take oral evidence from any of them. Further documents were provided to the Tribunal at the hearing. Those documents appeared to be more copies of telephone records.
26. On 11 August 2009, the Review Applicant provided a further statutory declaration to the Tribunal in support of her review application expressing her love for her husband that their relationship is genuine.

27. On 22 October 2009, the Review Applicant's migration agent sent to the Tribunal an e-Ticket receipt of the Review Applicant stating that she would travel to China to stay with her husband for several weeks.
28. On 12 November 2009, the Review Applicant's migration agent sent further documents in support of the review application including a foreigner's temporary accommodation registration card, travelling expenses receipt, photos, air tickets and travelling documents.
29. On 18 November 2009, the Review Applicant provided a further statement to the Tribunal, dated 16 November 2009, in support of the review application. The letter stated that she had just returned from China, having visited her husband and his children for two weeks. The letter stated that she needed to return to Sydney because her child was in an opportunity class and had an important selective high school entrance exam in March next year. She stated that whilst in China she lived with her husband and his children. She stated how much she missed her husband "*day and night*".
30. On 23 March 2010, the Review Applicant's migration agent sent a further document, being an air ticket booking information establishing that the Review Applicant intended to take her child with her to travel to China to visit her husband on 13 June 2010.
31. The decision of the Tribunal is accurately summarised by counsel for the First Respondent, Mr Reilly, in his written submissions as follows:

"The only subclass of the visa class that was relevant was Subclass 309 (Spouse (Provisional)): CB 175 [7]. The visa applicant claimed to satisfy cl309.211 and cl309.221 ie that he was the "spouse" of the Applicant at the time of application for the visa and at the time of the Tribunal's decision. The Tribunal found that he did not satisfy this criterion because it was not satisfied that there was a genuine spousal relationship between the visa applicant and the Applicant, having regard to the matters in reg 1.15A(3) of the Migration Regulations 1994. The Tribunal explained why it formed this conclusion at CB 192-197. It noted inconsistencies in their evidence and a lack of evidence of joint ownership of assets or pooling of financial resources and of cohabitation. It found that the Applicant and visa applicant were not witnesses of truth, and had created their claims in order to obtain the visa: CB 194 [110]. It found that they had not resided together briefly as man and wife in China as they claimed, and

found on balance that at both the time of application for the visa and at the time of its decision they did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that their relationship was genuine and continuing, as required by reg 1.15(1A)(b)(i) and (ii).”

The proceeding before this Court

32. The Review Applicant was represented by Mr Zipser, of counsel, at the hearing before this Court.
33. On 9 June 2010, Ms Douglas-Baker, of counsel, attended a directions hearing before me. On that occasion, the Review Applicant was given leave to file and serve an amended application, giving complete particulars of each ground of review relied upon, together with any further evidence by way of affidavit, including any transcript of the Tribunal hearing.
34. At the commencement of the hearing on 25 October 2010, Mr Zipser confirmed that the Review Applicant relied on the grounds contained in an amended application, filed on 9 August 2010. However, Mr Zipser informed the Court that the Review Applicant did not rely on Ground 1 of the amended application.
35. Mr Zipser was invited to make submissions in support of each of the grounds and in support of the application generally.
36. In support of the amended application Mr Zipser tendered, without objection, a bundle of documents marked Exhibit XPC-1, which were exhibited to the affidavit of the Review Applicant, affirmed 9 August 2010.
37. Exhibit XPC-1 contained documents returned from the Tribunal to the Review Applicant. In particular, they included telephone records of July 2009 which are not mentioned by the Tribunal in its decision record. Those telephone records show that the applicants appear to have had 16 telephone calls during that month, 3 of which exceeded 60 minutes in duration. The Tribunal referred only to the Visa Applicant's phone records for March to June 2009, showing 2 calls in March, 3 calls in April, 1 in May and 1 in June 2009.

38. Mr Zipser then commenced to make submissions in support of each of the grounds of the amended application. However, at the end of the day, Mr Zipser had yet to complete his submissions. The matter was then adjourned to 3 November 2010 for further hearing. Leave was granted to the Review Applicant to file and serve any further amended application and evidence in support, including any transcript of the Tribunal hearing, prior to the recommencement of the adjourned hearing.
39. At the recommencement of the hearing on 3 November 2010, Mr Zipser filed in Court, by consent, a further amended application and an affidavit that annexed parts of a transcript of the Tribunal hearing. The affidavit was read without objection. The grounds of the further amended application are as follows:

~~1. "The Tribunal failed to comply with ss 359AA(b)(i) and 359A(1)(b) of the Migration Act in relation to two matters it put to the review applicant at the hearing on 23 July 2009. Specifically:~~

~~a) The Tribunal put to the review applicant an apparent inconsistency between a civil mediation document and the visa applicant's evidence to the Tribunal, and explained that "this information was relevant because it suggested to the Tribunal that the visa applicant may not be being truthful about the circumstances of his children". In fact, the Tribunal used the apparent inconsistency to find that "the visa applicant and the review applicant are not witnesses of truth" and the visa applicant and the review applicant "have created their claims in order to obtain the visa sought". For the Tribunal to comply with s 359AA(b)(i), it should have explained to the review applicant at the hearing this additional relevance of the apparent inconsistency.~~

~~b) The Tribunal put to the review applicant that the visa applicant and the review applicant gave inconsistent evidence regarding whether the review applicant had met the visa applicant's brother, and explained "that this information was relevant because it suggested to the Tribunal that she and the visa applicant may have given inconsistent evidence regarding the social aspect of the relationship". In fact, the Tribunal used the inconsistency to find that "the visa applicant and the review applicant are not witnesses of truth" and the visa applicant and the review~~

~~applicant “have created their claims in order to obtain the visa sought”. For the Tribunal to comply with s 359AA(b) (i), it should have explained to the review applicant at the hearing this additional relevance of the apparent inconsistency.~~

2. The applicant brought three witnesses to the Tribunal hearing to give evidence. The Tribunal chose not to ask the witnesses any questions. The Tribunal has an inquisitorial function and must act judicially. A consequence of this function is that when an applicant presents to the Tribunal a witness to give evidence, if there are questions the Tribunal can ask the witness which may affect its decision, the Tribunal must ask the questions of the witness. In the present case, there were questions the Tribunal could ask the witnesses which may affect its decision, but the Tribunal did not ask any questions. Further, with reference to s 361 or s 363 of the Migration Act, the Tribunal failed to give genuine consideration to whether it should take oral evidence from the three witnesses (MIMIA v Maltsin (2005) 88 ALD 304 at [39]) and/or failed to exercise its discretion reasonably or justly (MIAC v SZMDS (2010) 266 ALR 367 at [123]; MIAC v SZIAI (2009) 259 ALR 429 at [15]). In the circumstances, the Tribunal fell into jurisdictional error.

3. The Tribunal, in finding that the visa applicant and the review applicant were not witnesses of truth:

a) ignored or failed to have regard to supporting documents and witness statements provided to the Tribunal which corroborated the applicant’s claims. The error is evident from the Tribunal’s “Findings and Reasons” in which it considered whether the visa applicant and the review applicant were witnesses of truth at [105]-[110] and then considered at [111]-[112] “evidence such as supporting statements, photos, travel receipts and temporary accommodation registration cards” which were provided to the Tribunal”.

b) ignored or failed to have regard to evidence in support of whether the visa applicant and review applicant had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship. The error is evident from the Tribunal’s “Findings and Reasons” in which it considered whether the visa applicant and the review applicant were witnesses of truth at [105]-[110] and then considered at [114]-[122] whether the visa applicant and review applicant

had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship.

4. The Tribunal found that the visa applicant and review applicant gave inconsistent evidence as to the date they became engaged to be married, and this was a basis for a finding that one or both was not a witness of truth. The Tribunal fell into jurisdictional error in making this finding. Specifically:

a) The Tribunal did not make a finding as to what was “the truth”. The Tribunal cannot find that either witness was not a witness of truth if it did not make a finding as to what was “the truth”.

b) The Tribunal reasoned that the mere fact that the visa applicant and review applicant gave inconsistent evidence meant that one or both was not a witness of truth. However, the mere fact that the visa applicant and review applicant gave inconsistent evidence does not mean that one or both was not a witness of truth. Something more is needed. There was nothing more. It follows that there was no evidence on which the Tribunal could find that the review applicant and visa applicant were not witnesses of truth.

c) The Tribunal’s findings or inferences of fact were not supported by logical grounds.

5. The Tribunal found that the visa applicant provided inconsistent evidence to the Tribunal about the custody of his child, and this was a basis for a finding that the visa applicant and/or review applicant was not a witness of truth. The Tribunal fell into jurisdictional error in making this finding. Specifically:

a) The Tribunal found that the visa applicant gave oral evidence which was inconsistent with “the 1999 divorce document”. In fact, the visa applicant did not give oral evidence which was inconsistent with “the 1999 divorce document. There was no evidence to support a finding that the visa applicant gave inconsistent evidence.

b) The Tribunal did not make a finding as to what was “the truth”. The Tribunal cannot find that the visa applicant was not a witness of truth if it did not make a finding as to what was “the truth”.

c) The Tribunal’s findings or inferences of fact were not supported by logical grounds.

6. *The Tribunal found that, in relation to the living arrangements of the visa applicant's children, it preferred the delegate's report of evidence the husband gave at an interview on 25 September 2007, and this was a basis for a finding that the visa applicant and/or the review applicant was not a witness of truth. The Tribunal fell into jurisdictional error in making this finding. Specifically:*

a) The visa applicant provided to the Department and to the Tribunal the household register of the visa applicant and his two children which recorded that the visa applicant and his two children resided together. The Tribunal ignored or failed to have regard to the document.

b) Four witnesses gave evidence that, following separation from his ex wife, the visa applicant raised his two children. The Tribunal ignored or failed to have regard to these witness statements in making a finding about the living arrangements of the visa applicant's children.

c) The Tribunal made two serious adverse credibility findings against the applicant which required inconsistent and contradictory interpretations by the Tribunal of "the 1999 divorce document". This involves a failure by the Tribunal to act judicially.

7. *The Tribunal found that the visa applicant and review applicant gave inconsistent evidence as to which members of the visa applicant's family the review applicant had met, and this was a basis for a finding that one or both was not a witness of truth. The Tribunal fell into jurisdictional error in making this finding. Specifically:*

a) The Tribunal did not make a finding as to what was "the truth". The Tribunal cannot find that the visa applicant was not a witness of truth if it did not make a finding as to what was "the truth".

b) The Tribunal reasoned that the mere fact that the visa applicant and review applicant gave inconsistent evidence meant that one or both was not a witness of truth. However, the mere fact that the visa applicant and review applicant gave inconsistent evidence does not mean that one or both was not a witness of truth. Something more is needed. There was nothing more. It follows that there was no evidence on which the Tribunal could find that the review applicant and visa applicant were not witnesses of truth.

c) The Tribunal's findings or inferences of fact were not supported by logical grounds.

8. The Tribunal found that the visa applicant and review applicant "have created their claims in order to obtain the visa sought". The Tribunal ignored or failed to have regard to the witness statements and supporting documents provided by the applicant to the Tribunal in finding that the visa applicant and the review applicant created their claims in order to obtain the visa sought.

9. The Tribunal found that it "placed little weight on the declarations, telephone details, letters and photographs" provided to the Tribunal. The Tribunal fell into jurisdictional error in making this finding. Specifically:

~~a) The Tribunal was provided with a number of documents in or containing Chinese which it did not translate into English. The Tribunal should have translated into English and had regard to some of the documents or warned the applicant that unless the applicant provided a translation of the documents the Tribunal would not have regard to the documents. The Tribunal's failure to follow this process was a jurisdictional error.~~

b) The Tribunal overlooked or failed to have regard to some of the visa applicant's phone records and overlooked or failed to have regard to the duration of the calls. This was a jurisdictional error.

c) The Tribunal erred in finding that it placed little weight on witness statements provided by relatives of the visa applicant or review applicant on the basis that they "have an interest in the outcome of the application".

10. The Tribunal was "not satisfied that at the time of application and at the time of decision the visa applicant and the review applicant had a mutual commitment to a shared life as husband and wife ... and that the relationship is genuine and continuing". The Tribunal fell into jurisdictional error in making these findings. Specifically:

a) There was no evidence to support the findings.

b) The Tribunal's findings or inferences of fact were not supported by logical grounds."

Ground 1

40. Ground 1 was withdrawn by Mr Zipser at the commencement of the hearing on 28 October 2010.

Ground 2

41. At the heart of Ground 2, is a complaint by the Review Applicant that the Tribunal chose not to ask questions of the three witnesses brought to the Tribunal hearing and which the Tribunal swore in at the commencement of the hearing. As stated above, the witnesses were the Review Applicant's son, mother and sister-in-law, each of whom had provided a statement to the Tribunal in support of the review application.
42. The sister-in-law's, statement, dated 1 July 2009, stated that the Review Applicant is a very good friend and that she has known the Visa Applicant since 1997 and that he is also a friend. The sister-in-law stated that she witnessed them fall in love and get married. She said that, in preparation for the Visa Applicant and his children moving to Australia, the Review Applicant rented an appropriate house and contacted a prospective school in respect of the two children. The sister-in-law's statement went on to say that the Review Applicant's work in Australia is very busy and that the economic conditions have not allowed her to travel back to China "*all the time*". She stated that "*just like other couples*" the Review Applicant and the Visa Applicant kept contact via telephone. She stated that their marriage and relationship is genuine. She stated that, in November 2008, the Review Applicant missed her husband so much that she travelled to China for two weeks to be with him. She stated that the economic climate and responsibility to her children did not allow her to stay in China with her husband. The sister-in-law stated that the Review Applicant and the Visa Applicant's relationship "*is recognized by family members, relatives and friends. All of us bless them and feel they are perfectly matched. They both stepped out of the shadow and formed their new family with careful decision. To them, their marriage is their life-long choice.*"

43. The son of the Review Applicant provided a statement, dated 5 July 2009, in which he said that his mother and the Visa Applicant knew each other since 2006 through friends and then married. He said his mother has been very upset since the rejection of the Visa Applicant's application, and stated that *"only my family knows the marriage is true, and I believe my Mum do love [the Visa Applicant]"*. The Review Applicant's son stated that he and his girlfriend went to China during Christmas 2008 to meet the Visa Applicant and they had dinner together a few times. He said the Visa Applicant treated him as a member of the family with respect. The Review Applicant's son stated that he liked the Visa Applicant and had the impression that he is a *"very kind, honest and friendly man. We had good time together"*. He stated the Review Applicant and the Visa Applicant *"are getting old, and will be great if there is someone next to each other to keep them company. If you have any question regarding to the marriage, feel free to contact me or my family. I will be glad to answer any of your enquiries."*
44. The mother's statement is undated and states that she supports her daughter's choice of husband and that she accompanied her daughter to China to get married. She stated that both the Review Applicant and the Visa Applicant are the kind of persons who concentrate on family life. She stated that *"after their marriage, they keep good husband and wife relationship until now. Although because of the visa problem, they live apart, however, they still keep very close contact."* She stated that, although the Review Applicant needed to take care of her children and was busy with her work, she still took time to go back to China to be with her husband. She stated that the Visa Applicant always asks his friend to bring her (the mother) gifts during New Year and other important holidays. She stated that both the Visa Applicant and her daughter are very hardworking and diligent people and will make an effort to build up *"a beautiful and happy family in Australia together"*. She stated that:

"in our old generation's view, the simple and genuine marriage life is just like this. It will not be affected by the distance, time or other external effects. However, I also see my daughter misses her husband so much in these few years. I have also seen how heavy the blow to my daughter when [the Visa Applicant's] visa was refused."

45. The criteria required to be met by the Visa Applicant for the subclass 309 visa is stated in the Migration Regulations. In particular, reg. 1.15A(3) sets out circumstances of the relationship to which the Minister must have regard in considering all of the circumstances of the relationship. Relevantly, reg. 1.15A is as follows:

“Spouse

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

*(b) a **Partner (Provisional) (Class UF) visa**; or*

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

*(a) **the financial aspects of the relationship, including:***

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

*(b) **the nature of the household, including:***

(i) *any joint responsibility for the care and support of children; and*

(ii) *the living arrangements of the persons; and*

(iii) *any sharing of the responsibility for housework; and*

(c) *the social aspects of the relationship, including:*

(i) *whether the persons represent themselves to other people as being married to each other; and*

(ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*

(iii) *any basis on which the persons plan and undertake joint social activities; and*

(d) *the nature of the persons' commitment to each other, including:*

(i) *the duration of the relationship; and*

(ii) *the length of time during which the persons have lived together; and*

(iii) *the degree of companionship and emotional support that the persons draw from each other; and*

(iv) *whether the persons see the relationship as a long-term one.*

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."

46. In relation to the three witnesses above, the transcript discloses that each was sworn in at the commencement of the hearing and then asked to leave the room. The Tribunal Member told them that they would be invited back when the Tribunal was ready to hear from them. Following the Tribunal's discussion with the Review Applicant and the Visa Applicant, the Tribunal Member had the following exchange with the Review Applicant's advisor.

“Member: Advisor, there are a number of witnesses outside who want to give evidence. What is the nature of the evidence? Bear in mind that you have already provided declarations from those people. Are they just here to tell me what they told me in their declarations are the truth? Or they have some other information?”

Advisor: They’re two introduced.

Member: Yes, I know. What I am asking you is we have a problem with the interpreter. He has to leave, and I am asking you if it is necessary for me to call them? Because are they going to tell me exactly what they have written in the documents?

Advisor: I think they have already provided their writing. May be Sam...

Advisor: (asking the review applicant in mix of Mandarin and English): have your son written...?

Member: He made the statement, too.

Member: Is there anything in addition?

Member: I am just trying to say how I am going to conduct this hearing.

Advisor: Not more than that.

Member: Not more. Okay. All right.

Member: (speak (sic) to the officer in very low voice) Okay, officer, it doesn’t say I am going to make you to swear in any more witnesses although today we have a few more witnesses to come in.

Officer: The advisor was saying if we had time, then they would like to speak to us in person, but...

Member: (interrupted in) But what they are going to tell me is exactly the same as what’s written here. Do you understand what I am saying?

Advisor: Yes, I know... I know... Yeah.

Member: Do you want to ask your client?

Advisor: En (sic)... ...

(Interpreter: She was saying because I don't have time...)

Member: (interrupted in) No, no, interpreter, the... (Laugh loudly) don't give advice...

Interpreter: I think I was just tell her what you said to her.

Some discussion occurred in very low voice (cannot hear clearly who was talking.)

Second Member: they just talk about the feeling.

Member: The feeling? How they feel about.

*Advisor: **The mother, especially the mother and worried about her daughter, when she talked to me. And she hope the tribunal correct decision.***

...

*Member: **Okay, Advisor, I don't propose to hear from the witnesses. We've got statements from them. And I will take on board your comments** that the review applicant's mother wishes to know her feelings towards the visa applicant. And I will take on board her declaration that she has provided.*

Member: I am just closing down my computer now. Interpreter, thank you about giving some extra time. We didn't anticipate the hearing will go longer." (emphasis added)

47. Counsel for the Review Applicant, Mr Zipser, submitted that where the Tribunal placed little or no weight on the written statements of the witnesses as supportive or corroborative of the claims of the Review Applicant, procedural fairness demanded that the Tribunal make further enquiries of the witnesses that may have addressed the unexpressed concerns that the Tribunal had. I accept that there is no express finding in the decision record by the Tribunal that any of the witnesses were untruthful in their statements.
48. Mr Zipser referred the Court to *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* (2005) 88 ALD 304 ("**Maltsin**") where Kenny and Lander JJ stated at [36] that:

"Under the regime established by the Act it is for the tribunal, not the applicant to gather the evidence for the purposes of a review and to decide the manner in which the evidence will be taken."

49. *Maltsin* involved a request made pursuant to s.361 of the Act that the tribunal take evidence from specified witnesses. The tribunal declined to do so, on the basis it did not have sufficient time on the day to hear much more than the evidence of the Review Applicants and that one of the witnesses had, in any event, provided a written statement. The Full Court held that, in those circumstances, the tribunal had not made “*any precise inquiry about the nature of the evidence that the prospective witnesses could give, or turn her own mind to the relative importance of their evidence*” (at [40]). It is well established that an invitation to appear before a Tribunal must be real and meaningful and not just an empty gesture (See: *NALQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 121 at [30]; *Maltsin* at [38]).

50. The Tribunal must give genuine consideration to the wishes of an Review Applicant in relation to evidence to be taken at a hearing must be genuine. As Kenny and Lander JJ said in *Maltsin* at [38]:

*“The tribunal must not decline to comply with the applicant’s wishes capriciously, but **must take account of such relevant matters as the relevance and potential importance to the outcome of the review of the evidence that could be given by a nominated witness** (cf *W360/01A v Minister for Immigration and Multicultural Affairs* (2002) 124 FCR 449 ; [2002] FCAFC 211 (*W360/01A*) at [2] per Lee and Finkelstein JJ and [30]–[32] per Carr J), **the sufficiency of any written evidence that has already been given by a witness and the length of time that would afford the applicant a fair opportunity to put his or her case before the tribunal.**”* (emphasis added)

51. It is also well established that where a statutory power is conferred, the legislature is taken to intend that the discretion be exercised reasonably and justly (*Minister for Immigration and Citizenship v SZIAI* (2009) 111 ALD 15 (“**SZIAI**”) at [15]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (“**SZMDS**”) at [123]). As the High Court said in *SZIAI* at [25]:

“The duty imposed upon the tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure

could give rise to jurisdictional error by constructive failure to exercise jurisdiction.[footnote omitted] *It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.*” (emphasis added)

52. The High Court made clear in *Minister for Immigration and Multicultural and Indigenous Affairs v SZGLB* (2004) 207 ALR 12 at [43] that the Tribunal is under no duty to inquire and, even if an applicant requests that a tribunal summons a witness or take evidence from a witness, the tribunal is not required to do so (*Minister for Immigration and Citizenship v SZNVW* [2010] FCAFC 41 at [36] per Keane CJ and at [49] per Emmett J; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at [43] per Gummow and Hayne JJ (Gleeson CJ agreeing); *Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003* [2005] FCAFC 73 at [20]).
53. I note that in *Minister for Immigration and Multicultural and Indigenous Affairs v Katisat* [2005] FCA 1908 (at [53]), it was put to Bennett J that, while the tribunal is not obliged to call a witness, it is not implied by ss.361 and 363 of the Act that in normal circumstances when a timely request is made it will be acceded to by the tribunal. However, Bennett J stated that in considering whether a tribunal’s refusal to call a witness involves a denial of procedural fairness “*it is important to keep in mind the exact nature of the request and the context in which it was made*”. (emphasis added)
54. In the case before this Court, the Review Applicant did not make a request to the Tribunal to take oral evidence from her witnesses in accordance with s.361 or s.362 of the Act. As stated above, the Response to Hearing Form did not identify or provide contact details of any particular witness, although it suggested one might be called.
55. It would appear that the Tribunal understood that the Review Applicant was requesting at the hearing that the Tribunal take evidence from those witnesses. That is clear from the conduct of the Tribunal in having each of the witnesses sworn in at the commencement of the hearing.

56. It is apparent from the transcript, that neither the Review Applicant nor the migration agent suggested to the Tribunal that the witnesses were able to give any further evidence beyond those matters referred to in their statements. Certainly, no request was pressed that they give evidence. The Tribunal clearly asked the Review Applicant's migration agent whether any of the witnesses had further information and whether it was necessary for the Tribunal to call them. The advisor clearly answered that they had already provided their evidence in writing. The Tribunal confirmed that position with the advisor and asked the advisor if the advisor wished to confirm with the review Applicant. The advisor did say to the Tribunal Member that the mother was worried about her daughter and that the mother hoped the Tribunal would make the correct decision. The Tribunal Member responded that the Tribunal did not propose to hear from the witnesses as they had given statements, but that the Tribunal would take on board the migration agent's comments that the Review Applicant's mother wished her feelings about the Visa Applicant to be taken into account.
57. A fair reading of the transcript makes clear that the Tribunal specifically turned its mind to the nature of the evidence that these witnesses would give and was satisfied that any oral evidence would be confined to the matters already referred to in their declarations.
58. In circumstances where the Tribunal had sworn the witnesses in at the commencement of the hearing, it could not be said that the Tribunal had ignored the request to take evidence from the witnesses. The Tribunal was not obliged to take evidence from the witnesses. As stated above, the transcript makes clear that, far from it being put to the Tribunal that the witnesses may have further evidence to give, the migration agent confirmed that they did not.
59. In the circumstances and in the context of this matter, the Tribunal gave real and genuine consideration as to whether the witnesses should be called to give oral evidence. In the proper exercise of its discretion, the Tribunal decided not to take evidence from any of the witnesses.
60. In the circumstances, it was neither a denial of procedural fairness, nor a failure by the Tribunal to exercise its jurisdiction for the Tribunal to decide not to take evidence from those witnesses.

61. Accordingly, Ground 2 is not made out.

Ground 3(a), 8, 9 and 10

62. The complaints in Grounds 3, 8, 9 and 10 all emanate from the Tribunal's consideration of the Review Applicant's corroborative material in the supporting documents and witness statements and the fact that the statements were by relatives and friends of the parties.

63. They essentially fall into 4 categories which are dealt with below:

- (i) The statements in support of the Review Applicants;
- (ii) The Tribunal's finding that it placed little weight on the witness statements by relatives of the Review Applicant or the Visa Applicant because they "*have an interest in the outcome of the application*";
- (iii) The documents provided in support; and
- (iv) The telephone records between the Review Applicant and the Visa Applicant.

64. In the 'Findings and Reasons' section of its decision record, the Tribunal stated that it did not accept that the Review Applicant and the Visa Applicant were witnesses of truth for the following reasons. It then identified four particular reasons. At the conclusion of the expression of those reasons, the Tribunal stated, "*The Tribunal is satisfied that the Visa Applicant and the Review Applicant are not witnesses of truth. The Tribunal is satisfied that they have created their claims in order to obtain the visa sought.*"

65. The Tribunal noted the documentary evidence. The Tribunal stated as follows:

"111. The Tribunal notes that evidence such as supporting statements, photos, travel receipts and temporary accommodation registration cards have been provided. A large number of photographs have been submitted which show the parties either by themselves or with family members. Only a few photographs show the parties in company of non-relatives. Thirteen statutory declarations or statements attesting to the

*genuineness of the relationship between the parties have been provided. Two or three of the statements of support are from persons not directly, or indirectly, related to one or other of the parties: one is from a long standing friend and colleague of the visa applicant who says he met the review applicant before the engagement and thinks the couple are a good match for each other; another is from a friend of the visa applicant who states that he met the review applicant “many times” on her visits to China and had dinner with the couple during the last visit. **The remaining nine or ten statements are from relatives or persons related by marriage to one or other of the parties and who have an interest in the outcome of the application.** In relation to evidence of continued contact during periods of separation, a few cards and envelopes have been provided along with used phone cards. **The visa applicant’s phone records have been provided for March to June 2009** showing two calls to the review applicant in March, three calls in April, one in May and one in June 2009. In relation to evidence of co-habitation, no evidence has been provided about the first three week period of co-habitation following the wedding in January 2007, but the Tribunal is prepared to accept that this occurred.*

*112. Two Temporary Accommodation Registration cards have been submitted, showing the review applicant temporarily registered at the visa applicant’s address during two subsequent visits of two weeks duration. The Tribunal accepts that these trips were made, however, in the light of its findings about the truthfulness of the parties, the Tribunal places little weight upon the Temporary Accommodation Registration cards as evidence that they lived together in a genuine spouse relationship. **The Tribunal gives more weight to the impression it has formed of the relationship than to the various photos and other documents which have been provided, mostly by the parties and their relatives.**” (emphasis added)*

Categories (i) and (ii):

66. It is not correct to say that the Tribunal ignored or failed to have regard to the witness statements provided to the Tribunal. It did have regard to the statements. However, the Tribunal gave the statements little weight in its assessment of whether the applicants had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship. As stated above, the

Tribunal is required to have regard to the criteria in reg.1.15A(3) of the Regulations.

67. The Tribunal noted that there were 13 statutory declarations or statements that attested to the genuineness of the relationship between the parties. The Tribunal's decision record does not suggest that it found that the statements from those persons were forged or untruthful. It simply found that the content of the statements was not sufficiently persuasive in considering whether the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship.
68. None of the statements clearly purport to address the statutory criteria referred to in reg.1.15A(3) of the Regulations in terms. The statements generally do assert that the authors of those statements believe their relationship to be genuine. Certainly, the parties married in 2007. The statements also say that they genuinely liked each of the applicants. They make general references to the fact that the parties have kept in contact with each other without giving particulars.
69. The Tribunal does state that nine or 10 of the statements are from relatives or persons related by marriage to one or other of the applicants and that those parties have an interest in the outcome of the application. I do not accept the submission of the Review Applicant's counsel that the only reason that the Tribunal placed little weight on those statements was because they were relatives or persons with an interest in the outcome.
70. The Tribunal made clear that it gave more weight to the impression it formed of the relationship from the evidence given to it by the Review Applicant and the Visa Applicant in assessing their credibility.
71. However, in considering whether the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship, a fair reading of the Tribunal's decision record makes clear that it also had regard to other documents provided, but was not persuaded by them. Further, the Tribunal's decision record makes clear that it gave consideration to the statutory criteria in reg.1.15A(3) of the Regulations, as follows:

- (i) In relation to the financial aspects of the relationship, the Tribunal noted that there was no joint ownership of real estate or other major assets or any joint liabilities. There was no pooling of financial resources. The couple did not live together and there was no sharing of day to day household expenses and no major joint financial commitments. The Tribunal noted evidence before it of two money transfers from the Visa Applicant to the Applicant in Australia in May 2007 and July 2007. The Tribunal was not satisfied that that evidence in itself demonstrated that the parties have shared financial resources and expenses. The Tribunal noted that the parties each owned properties separately and do not have a joint bank account or other joint investment.
- (ii) The Tribunal also considered the nature of the applicants' households. The Tribunal noted that the parties do not live together. The Tribunal had regard to a three week period from January 2007 to February 2007 when the Applicant lived at the Visa Applicant's mother's house in China. The Tribunal noted that the Visa Applicant's two children did not live with them but remained at the Visa Applicant's house with their grandmother and a nanny. The Tribunal also noted that the parties claimed to have lived together for a period of two weeks in November 2008 and for two weeks in October 2009. The Tribunal also noted that two temporary accommodation registration cards that showed that the Applicant was registered at the Visa Applicant's address during visits in 2008 and 2009. The Tribunal noted that the parties did not have any joint responsibility for the care and support of any children.
- (iii) In relation to the social aspects of their relationship, the Tribunal noted that the parties held themselves out as a married couple that resided together and shared plans to undertake joint social activities and that they had the support of their friends and family. The Tribunal noted that the friends and relatives of the applicants did state that the applicants are identified socially as a couple. The Tribunal also noted that the Applicant claimed to have advised Centrelink that she had remarried.

- (iv) In relation to the nature of their commitment to each other, the Tribunal noted that the Applicant claimed to have purchased gifts in October 2008 at over \$10,000 and that the Visa Applicant provided money and gifts. The Tribunal noted that there was evidence of continued contact between the parties, such as cards and envelopes and used telephone cards.
72. Ultimately, all the evidence and material before the Tribunal was not sufficient to persuade it that the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship.
73. A fair reading of the Tribunal's decision record discloses that the Tribunal had regard to the supporting statements in considering the issue before it as to whether the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship. It is a matter for the Tribunal the weight it gives that evidence.
74. As stated above, the statements were not the sole reason that the Tribunal was not persuaded. I do not accept that the Tribunal expressed its doubt in respect of the statements to be based only on the fact that they were relatives. The Tribunal did no more than note that fact.
75. Ultimately, the Tribunal found each of the Review Applicant and the Visa Applicant not to be credible witnesses and was not persuaded that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship.

Categories (iii) and (iv)

76. In relation to (iii) and (iv), being the documentary evidence other than the statements, the Tribunal did have regard to the other documents, including temporary accommodation registration cards and the telephone records for March to June 2009. The Tribunal noted that the telephone records showed that in March there were two calls to the Review Applicant, in April three calls, in May one call and in June one call.

77. Counsel for the Review Applicant submitted that the Tribunal had failed to have regard to the telephone records in July 2009. Counsel for the First Respondent, Mr Reilly, conceded that those telephone records were before the Tribunal. Those telephone records show that there were 16 telephone calls between the applicants, three of which were for more than three hours in duration. It would appear that the Tribunal may not have regard to that piece of evidence.
78. As stated elsewhere in these reasons, those telephone records of July 2009 were tendered to the Court in a bundle, marked Exhibit 3A, being copies of documents said to be sent back from the Tribunal to the Review Applicant. The number of documents was somewhat voluminous. There is nothing in the Court Book, marked Exhibit 1A, to suggest that there was any submission from the migration agent or the parties in respect of the documents sent to the Tribunal. The July 2009 telephone record is not reproduced in the Court Book. However, counsel for the First Respondent conceded that it must have been before the Tribunal because it was part of the bundle sent back from the Tribunal to the Review Applicant.
79. It does not appear from the Court Book that the Review Applicant was assisted in any meaningful way by the presence of the migration agent, either in terms of any written submissions in support of the review application or in respect of any oral submissions at the hearing, or post hearing. All the correspondence from the migration agent, as disclosed in Exhibit 1A, comprised of no more than sending documents to the Tribunal that the migration agent received from the Review Applicant. The documents enclosed in the migration agent's letters were not accompanied by any explanation or submission to assist the Tribunal in understanding the relevance of the documents. In other words, the migration agent appeared to do no more than act as a post box for documents the migration agent received from the Review Applicant which were forwarded to the Tribunal.
80. In the circumstances, the Tribunal was left in the situation where it was required to sift through the applicants' somewhat voluminous material and decipher for itself what was relevant evidence and what was not. In such circumstances, it is unsurprising that a piece of evidence of the nature overlooked may have been overlooked.

81. It is well settled that the Tribunal is required to have regard to evidence provided by the applicants in support of their claims where that evidence is relevant and of importance and goes to an essential consideration, such that the material is so fundamental that it goes to the Tribunal's jurisdiction (see *WAFP v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 319 at [19] and [20]; *Minister for Immigration & Multicultural & Indigenous Affairs v Yusef* (2001) 206 CLR 323 at [82]). In my view, for the reasons below, the evidence of the July 2009 telephone calls does not meet those requirements.
82. On their face and by themselves, the July 2009 telephone calls do not establish that the applicants have a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship. The Tribunal expressed concerns with regard to the telephone conversations of which it was aware. The Tribunal found it relevant that in the months March, April, May and June, no more than three telephone calls were ever made in the month.
83. Exhibit 1A makes clear that there was no submission made to the Tribunal at the hearing by the Review Applicant or the migration agent seeking to draw the Tribunal's attention to the telephone calls in July 2009 and any relative importance they may have as being corroborative of the Review Applicant's claims.
84. In fact, it may be that the Tribunal did not overlook the telephone calls of July 2009. July 2009 appears to be the only month in respect of which there was evidence of extensive telephone calls. It may be that the Tribunal did not regard that piece of evidence as significantly relevant in light of the paucity of the number of calls in the four previous months. However, assuming the Tribunal did overlook the July 2009 telephone record, for the reasons above, it was not sufficiently critical evidence, such that the failure of the Tribunal to consider is an error going to the Tribunal's jurisdiction.
85. Accordingly grounds 3(a), 8 and 9 are not made out.
86. **Grounds 3(b) and 10**

87. In relation to the Review Applicant's complaint in Ground 10 that the Tribunal first considered whether the Review Applicants were witnesses of truth and then considered whether they had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship, a fair reading of the Tribunal's decision does not make out such a complaint.
88. Similarly, the complaint in Ground 3(b) that the Tribunal failed to have regard to evidence in support of whether the Review Applicant and the Visa Applicant had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship is not made out.
89. I accept the submissions of counsel for the First Respondent that expressions of conclusions in a particular sequence do not indicate a failure to consider the evidence as a whole (*Re Minister for Immigration and Multicultural Affairs, Ex Parte Applicant S20/2002* (2003) 73 ALD 1 at [14] per Gleeson CJ).
90. The Tribunal's summary of the evidence given at the hearing makes clear that the Tribunal explored with the Review Applicant and the Visa Applicant the beginning and development of their relationship, their wedding, the financial arrangements between the Review Applicant and the Visa Applicant, the contact the Visa Applicant has had with the sons of the Review Applicant and the custody arrangements in respect of the Visa Applicant's children in China. The Tribunal noted that it put to the Review Applicant and the Visa Applicant matters of concern it had arising out of their evidence on those issues and noted their responses.
91. Those matters that the Tribunal explored with the Review Applicant and the Visa Applicant are all matters that are relevant to the required criteria referred to in reg. 1.15A of the Regulations.
92. The Tribunal identified four particular reasons that it did not accept that the Review Applicant and the Visa Applicant were witnesses of truth. Those reasons essentially arise from inconsistencies that the Tribunal found to exist in the evidence between the Review Applicant and the Visa Applicant. It was matter for the Tribunal the weight it placed on the evidence of the Review Applicant and the Visa Applicant and the

manner in which they delivered their evidence. The Tribunal specifically refers to the impression it formed of their relationship after having heard from them. It found that they were not witnesses of truth. Those are findings that the Tribunal was entitled to make. It is well established that the Tribunal is not obliged to give the parties a running commentary on their evidence (*SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)).

93. The Tribunal stated that it had regard to all of the circumstances of the relationship between the Review Applicant and the Visa Applicant in considering whether they had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship. A fair reading of the Tribunal's decision record bears out that statement. The Tribunal clearly considered the applicants' evidence, both oral and documentary, in light of those indicia referred to in reg. 1.15A, together with all the circumstances of the relationship.
94. It was for the Tribunal to determine the weight it gave to the evidence before it. The Tribunal was unpersuaded by the corroborative evidence provided by the applicants, even though it did not find such evidence to be forged or fraudulent. The Tribunal explained the difficulties it had with the corroborative evidence and the reasons why it placed little weight on that material in preference to the impression it formed of the credibility of the applicants having explored their evidence with them. It was entitled to do so.
95. In the circumstances, there was evidence to support the Tribunal's findings. The Tribunal's findings were open to it on the evidence and materials before it and for the reasons it gave, including its adverse credibility findings. Credibility findings are a matter par excellence for the Court (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67] per McHugh J).
96. Accordingly, Ground 3 (b) and 10 are not made out.

Grounds 4, 5, 6 and 7

97. These grounds refer to the particular four reasons that the Tribunal gave for its adverse credibility findings in respect of the Review Applicant and the Visa Applicant and assert that the Tribunal should have decided who was truthful.
98. The Tribunal found that the inconsistencies in the evidence of the applicants and their lack of satisfactory explanations led to its adverse credibility findings. In those circumstances, it was not necessary for the Tribunal to decide which of the applicants was truthful or untruthful. The Tribunal made clear the inconsistencies that caused it concern and as stated above, those findings were open to it on the evidence and material before it.
99. The adverse credibility findings arose from inconsistencies that the Tribunal found to exist in their evidence. Three of the inconsistencies were inconsistencies that the Tribunal found to arise in the evidence of the Visa Applicant. The Tribunal put those inconsistencies to the Review Applicant but was not satisfied by the explanation given by the Review Applicant
100. The first matter relates to evidence given by the Visa Applicant and the Review Applicant as to the timing and circumstances of their engagement. The Tribunal found their evidence to be inconsistent and the Review Applicant's explanation unsatisfactory.
101. The second related to evidence given by the Visa Applicant as to the custody arrangement of his children over the years between him and his ex-wife. The Tribunal put those inconsistencies to the Review Applicant and found she was unable to explain them, noting that she said she was not told too much about the custody arrangements. The Tribunal noted that it did not accept that the Visa Applicant had satisfactorily explained the care, control and custody of his children.
102. The third matter related to the Visa Applicant's evidence in relation to the various living arrangements his children had between him and his ex-wife over the years. The Tribunal found the evidence to be inconsistent and put that concern to the Review Applicant who attempted to explain the inconsistency. The Tribunal found the Review

Applicant's explanation involved a "*late invention*", made to overcome the evidence given to the Department. The inconsistency related to information given by the Visa Applicant to the Department and evidence given by him at the Tribunal hearing.

103. The fourth matter related to the difference in recollection between the Visa Applicant and the Review Applicant about whom the Review Applicant met at the wedding. Again, the Tribunal rejected the Review Applicant's explanation.
104. The decision record makes clear that it was open to the Tribunal to find the inconsistencies that it did and it was further open to it not to be satisfied by the explanations provided by the Review Applicant and the Visa Applicant. It was also open to the Tribunal to find those matters led it to form an adverse view of the credibility of the Review Applicant and the Visa Applicant. Credibility findings are a matter par excellence for the Tribunal (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67] per McHugh J).
105. As stated above, the Tribunal had regard to all the evidence of the Review Applicant and the Visa Applicant and material in support as well as considering the required criteria of reg. 1.15A criteria in considering whether they had a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship. That was the critical issue before the Tribunal and it was for the Review Applicant and the Visa Applicant to satisfy the Tribunal that they met the relevant criteria for the spousal visa. As stated above, it was open to the Tribunal not to be satisfied, on the evidence and material before it and for the reasons it gave, that the Review Applicant and the Visa Applicant did not demonstrate a degree of commitment to each other consistent with their having a mutual commitment to a shared life as husband and wife to the exclusion of all others and were in a genuine and continuing relationship.
106. Accordingly, Grounds 4, 5, 6 and 7 are made out.

Conclusion

107. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.
108. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no jurisdiction to interfere.
109. The proceeding before this Court should be dismissed with costs.

I certify that the preceding one hundred and eight (108) paragraphs are a true copy of the reasons for judgment of Emmett FM

Date: 8 December 2010